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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/586,493	06/02/2000	S. T. Lee	D-30207-01	6212

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EXAMINER

BISSETT, MELANIE D

ART UNIT PAPER NUMBER

1711

DATE MAILED: 02/13/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/586,493

Applicant(s)

LEE ET AL.

Examiner

Melanie Bagwell-Bissett

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 18 January 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-6, 8-14, 16 and 17 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-6, 8-14, 16 and 17 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

DETAILED ACTION

1. The request filed on 1/18/02 for a Continued Examination (RCE) under 37 CFR 1.114 based on parent Application No. 09/586,493 is acceptable and an RCE has been established. An action on the RCE follows.
2. The rejections based on 35 USC 103 using Sakamoto et al. have been withdrawn based on the applicant's amendment filed 1/18/02. However, new rejections have been added.

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in-

(1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effect under this subsection of a national application published under section 122(b) only if the international application designating the United States was published under Article 21(2)(a) of such treaty in the English language; or
(2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that a patent shall not be deemed filed in the United States for the purposes of this subsection based on the filing of an international application filed under the treaty defined in section 351(a).

4. Claims 1-6, 9-14, and 16-17 are rejected under 35 U.S.C. 102(e) as being anticipated by Lee et al.
5. Lee et al. discloses foamed polyolefin blends comprising LDPE and an ethylene/ α -olefin copolymer, where the copolymer has a density ranging from 0.86 to about 0.94 g/cm³ and a melt index higher than 10 g/10 minutes (col. 2 lines 42-47). Since the term "about 0.94 g/cm³" encompasses values greater than 0.94, the range of

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Lee's invention anticipates a density greater than 0.94. The reference prefers copolymers having melt indices higher than 20 g/10 minutes (col. 2 lines 57-64). Since present claim 16 recites a melt flow index ranging from "**about** 23 to about 69 g/10 minutes" (emphasis added), it is the examiner's position that the reference, teaching melt indices higher than 20 g/10 minutes, anticipates the limitation. Lee teaches preferably mixing 50-90% by weight LDPE with 10-50% by weight ethylene copolymer (col. 3 lines 10-22). Foams are made to exhibit a desired density ranging from 10-150 kg/m³ by extruding a foamable composition including the ethylene polymers and, preferably, physical blowing agents (col. 3 lines 35-53) into a region of reduced temperature and pressure (col. 4 lines 16-22). Additionally, aging modifiers such as fatty acid esters, fatty acid amides, and hydroxyl amides may be included in the composition (col. 3 line 64-col. 4 line 4). Foam sheets have a preferred maximum thickness of about 15 mm (col. 3 lines 23-29).

Double Patenting

6. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

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Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

7. Claims 1-6 and 8-14 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-3, 5-10, and 12-15 of U.S. Patent No. 6,096,793A in view of Hurley et al.

8. Claim 7 of the '793 patent claims a foam comprising a blend of LDPE with an ethylene/ α -olefin copolymer, where the copolymer has a density of about 0.86 to about 0.94 g/cm³ and a melt flow index greater than 10 g/10 minutes. Specifically, claim 7 limits the density of the foam to about 10 to about 150 kg/m³. As previously stated, since the term "about 0.94 g/cm³" encompasses values greater than 0.94, the range of Lee's invention teaches a density greater than 0.94. Additionally, claim 15 of the '793 patent claims a method of making a foam by blending LDPE with an ethylene/ α -olefin copolymer, adding a blowing agent, and causing the blowing agent to expand. The copolymer has a melt index greater than 10 g/10 minutes and a density of about 0.86 to about 0.94 g/cm³. Specifically, claim 15 limits the foam to have a density from about 10 to about 150 kg/m³.

9. However, the claims do not specify the use of a physical blowing agent or the addition of an aging modifier. Hurley discloses a foamed polyethylene blend made by incorporating physical blowing agents into the blend, where foams made with physical blowing agents are shown to have several applications (col. 1 lines 18-48). Further, the use of additives such as fatty acid amides and fatty acid esters improves gas exchange of the foam to minimize aging time (col. 8 lines 26-39). It is the examiner's position that

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it would have been prima facie obvious to use a physical blowing agent and an aging modifier in Lee's invention to provide foams capable for use in cushioning applications having improved gas exchange and aging properties.

10. Claims 2-3, 5-6, 9-10, and 12-14 of the '793 patent parallel present claims 2-6 and 9-14. It is the examiner's position that it would have been prima facie obvious to limit the melt flow index, weight ratios of components, sheet thickness, and processing by the teaching of patented claims 2-3, 5-6, 9-10, and 12-14 in the expectancy of forming equally improved polyolefin foams.

Response to Arguments

11. Applicant's arguments with respect to claims 1-6 and 8-14 have been considered but are moot in view of the new ground(s) of rejection.

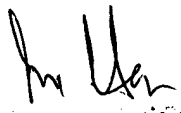
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Melanie Bagwell-Bissett whose telephone number is (703) 308-6539. The examiner can normally be reached on M-F 8-4:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, James Seidleck can be reached on (703) 308-2462. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9311 for After Final communications.

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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

mdb
February 8, 2002


James H. Miller
Supervisory Patent Examiner
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